Supreme Court, U. S.
FILED
DEC 19 1975
MICHAEL RODAK, JR., CLERK

NO. 75-76

IN THE

Supreme Court of the United States

October Term, 1975

SOUTH DAKOTA,
Petitioner,

vs.

DONALD OPPERMAN,
Respondent.

AMICUS CURIAE BRIEF

TONEY ANAYA
Attorney General of New Mexico

WARREN O. F. HARRIS
Deputy Attorney General

Supreme Court Building
Post Office Box 2246
Santa Fe, New Mexico 87503

December, 1975

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

Page

POINT I

THE SOUTH DAKOTA SUPREME COURT DID ERR IN HOLDING INADMISSIBLE EVIDENCE DISCOVERED DURING AN INVENTORY SEARCH. 1

TABLE OF AUTHORITIES

Cases

Bennett v. State, Okla. Cr., 507 P.2d 1252 (Ct. Cr. App.1973). 7

Cabbler v. Commonwealth, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971) 5

Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973). 2, 4, 8

Capps v. State, 505 S.W.2d 727 (1974) 7

Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). 8

Cooper v. California, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967). 4

Haerr v. United States, 240 F.2d 533 (5th Cir. 1957) 3

Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968). 5, 6

Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967). 3, 4

In Re One 1965 Econoline, Etc., 109 Ariz. 433, 511 P.2d 168 (1973) 8

Knight v. State, Fla., 212 So.2d 900 (Ct. App. 1968) 8

Mackall v. State, 7 Md. App. 246, 255 A.2d 98 (Ct. Sp. App. 1969) 8

Manzanec v. Flannery, 176 Tenn. 125, 138 S.W.2d 441 (1940) 3

Nichols v. Commonwealth, Ky., 408 S.W.2d 189 (Ct. App. 1966) 3

People v. Sullivan, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971) 2, 5

Cases (Cont'd) **Page**

People v. Trusty, Colo., 516 P.2d 423 (1973) 7
Preston v. United States, 376 U.S. 364, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964) 8
Roush v. State, Fla., 203 So.2d 632 (Ct. App. 1967) 8
State v. Gwinn, 301 A.2d 291 (Del. Supr. 1972) 7
State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968) ... 8
State v. Olsen, 43 Wash.2d 726, 263 P.2d 824 (1953) 5, 8
State v. Opperman, 17 Cr. L. 2126, 228 N.W.2d 152 (S.D. 1975) 2, 4, 5, 6, 7, 8
State v. Undorf, 210 Kan. 1, 499 P.2d 1105 (1972) 8
State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974). .7,8
State v. Wallen, 185 Neb. 44, 173 N.W.2d 372 (1970) 2
State v. Wooten, 18 N.C. 269, 196 S.E.2d 603 (Ct. App. 1973) 3
State v. Woodall, 16 Ohio Misc. 226, 241 N.E. 755 (Ct. Com. Pl. 1968) 3
United States v. Clarke, 451 F.2d 584 (5th Cir. 1971) 3
United States v. Gerlatz, 350 F. Supp. 180 (U.S.D.C., E.D. Mich. 1972) 7
United States v. Gravitt, 484 F.2d 375 (5th Cir. 1973) 8
United States v. Pennington, 441 F.2d 241, *cert. den.*, 404 U.S. 854, 30 L.Ed.2d 94, 92 S.Ct. 97 (1971) 7
United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) 7

Constitutions

United States Constitution, Fourth Amendment 2, 3, 4, 8

Texts

Annot., 48 A.L.R. 3d 537 (1973) 5
44 L.W. 3257 (1975) 2
Ronald W. Szwajowski, University of Illinois Law Forum (1968) 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75–76

SOUTH DAKOTA,
Petitioner,

vs.

DONALD OPPERMAN,
Respondent.

AMICUS CURIAE BRIEF

POINT I

THE SOUTH DAKOTA SUPREME COURT DID ERR IN HOLDING INADMISSIBLE EVIDENCE DISCOVERED DURING AN INVENTORY SEARCH.

Following the impoundment of the automobile owned by Donald Opperman and pursuant to a standard procedure of the Vermillion, South Dakota Police Department, the contents of the vehicle were inventoried by a police officer. The officer's inventory extended into the closed console compartment where

he found marijuana. Opperman was convicted of possession of less than one ounce of marijuana. Defendant contended on appeal, as he did at trial, that the marijuana should have been suppressed because it was discovered during a search that violated the Fourth Amendment to the United States Constitution. The Supreme Court of South Dakota determined the inventory procedure to be an unreasonable search in violation of the Fourth Amendment and reversed the conviction of defendant-appellant Opperman. See *State v. Opperman*, 17 Cr. L. 2126, 228 N.W.2d 152 (S.D. 1975). The United States Supreme Court granted review to determine if the South Dakota Supreme Court erred in holding inadmissible the evidence found in the console of Opperman's vehicle. 44 L.W. 3257 (1975).

As a threshold issue the Supreme Court of South Dakota determined that an inventory is a search. The United States Supreme Court has expressly declined defining an inventory procedure as a search. *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973). *People v. Sullivan*, 29 N.Y. 2d 69, 323, N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971), a case square with *Opperman*, held that inventories are not searches. The defendant's car in *Sullivan* was impounded for a parking violation. A New York City Police Department regulation required that valuable property in an impounded automobile be recorded. The inventory of the contents of the vehicle revealed a loaded pistol for possession of which defendant was convicted. Contrary to the conclusion of the *Opperman* court, Judge Bergan, for the majority, opined that, "A 'search' is an intrusion under color of authority on an individual's 'vehicle', 'for the purpose of' seizing things (Tentative Draft No. 3, 1970, Art. 1, Sec. SS 1.01, subd. [1]). This is just what the inventory examination in the present case is not." In accord is *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372 (1970), in which the Nebraska Supreme Court refused to hold that an inventory is a search. The doctrine explicated in *Sullivan*, that certain procedures during which items are secured are not searches because their purpose is not to discover contraband or evidence, finds

federal foundation in *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957) and *United States v. Clarke*, 451 F.2d 584 (5th Cir. 1971). Circuit Judge Cameron defined a search:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action." *Haerr v. United States*, 240 F.2d at 535.

Several jurisdictions concur with the *Haerr* definition of a search; *State v. Wooten*, 18 N.C. 269, 196 S.E.2d 603 (Ct. App. 1973); *Nichols v. Commonwealth, Ky.*, 408 S.W.2d 189 (Ct. App. 1966); *Manzanec v. Flannery*, 176 Tenn. 125, 138 S.W.2d 441 (1940); *State v. Woodall*, 16 Ohio Misc. 226, 241 N.E. 755 (Ct. Com. Pl. 1968).

The purpose of the inventory conducted by the Vermillion police officer, indeed the purpose of all proper inventories, was to catalog and safeguard property of the vehicle owner. Contraband, "fruits" and evidence of crime were not sought to be discovered. If contraband and criminal evidence are the objects of the procedure it becomes a search within the purview and proscriptions of the Fourth Amendment.

By basing its finding that inventories are searches on the premise that holding otherwise "would lead to the encouragement of fishing expeditions, and a whittling away of Fourth Amendment protections" the South Dakota Justices failed to recognize that courts which have validated inventory procedure do not grant free reign to officers in the conduct of the procedure. *Heffley v. State*, 83 Nev. 100, 423 P.2d 666 (1967), aptly gives the general rule:

> "The police officer, when there is just cause, has a duty not only to impound a car from the public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. . . . *If, however, the policing conduct indicates that the intention is exploratory rather than inventory the fruits of that search are forbidden.* . . . Unfortunately, distinguishing inventory from exploration may prove to be ambitious

> and unprecise. We can only say that each case must be determined upon its own facts and circumstances. *Heffley v. State*, 83 Nev. at 104. [Emphasis added.]

Ample protection against "fishing expeditions" is provided by stringent application of the scrutinization suggested in *Heffley*. It appears to be an overreaction to proscribe inventory procedure altogether when a case-by-case examination of the conduct of officers using the inventory procedure can provide proper protection against encroachment of Fourth Amendment rights.

The South Dakota Supreme Court sought to distinguish recent United States Supreme Court decisions, the import of which is that inventory procedures are valid. In *Cooper v. California*, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967), the petitioner's automobile was impounded and held for forfeiture proceedings. A week after the impoundment and four months before the forfeiture officers searched the vehicle and found evidence in the glove compartment subsequently used to help convict petitioner. The court held the warrantless search reasonable. The *Opperman* court sought to distinguish *Cooper* because "the vehicle here was not impounded for forfeiture action." By placing such emphasis on the reason for the car's impoundment the court skirts the important principle of *Cooper*, which is that a vehicle lawfully in the custody of police officials may be examined:

> "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, *even for their own protection*, to search it. *Cooper v. California*, 386 U.S. at 62. [Emphasis supplied.]

The Supreme Court held in *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), that the warrantless intrusion by an officer into the trunk of the automobile of respondent Dombrowski was proper, emphasizing, first, that "the police had to exercise a form of custody or control" over respondent's vehicle and, second, that the procedure of entering the automobile's trunk was a standard measure to protect the

public from the possibility of harm. Again, the *Opperman* court, for purposes of distinguishing *Cady*, focused on the reason for the police assuming custody of the vehicle arguing that the car in *Cady* was a "nuisance" while the vehicle illegally parked in *Opperman* was not. Illegally parked cars do constitute an interference with public and private rights. *People v. Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971). However, the reason for the impoundment of an automobile is not the critical issue, far more important is whether custody is lawfully gained. The two essentials of an inventory are that it is not a subterfuge for a warrantless search and that the officials have lawful custody of the vehicle. Annot., 48 A.L.R.3d 537 (1973). *Cady* stressed that once lawful custody is assumed officers may examine the inside of the vehicle for the protection of the public. In *Cady* the police entered the vehicle of Dombrowski specifically to locate a weapon. The court approved the procedure because locating the weapon was for the public's protection. Protection of the public is the basis of inventory searches:

> "It has always been the public policy of the Commonwealth to preserve and protect the individual rights of citizens. Public policy also dictates that a citizen's rights and his property shall likewise be preserved and protected." *Cabbler v. Commonwealth*, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971).

Public safety is promoted by inventories, e.g., *State v. Olsen*, 43 Wash.2d 726, 263 P.2d 824 (1953), wherein a loaded pistol was found pursuant to an inventory.

The *Opperman* court distinguished the facts of *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968), by asserting that the evidence seized in *Harris* was the result of a "plain view" discovery, while the marijuana found in *Opperman* was not in plain sight. *Harris* is, however, supportive of inventory procedures because it posits that police may utilize measures to protect property in their custody. If, pursuant to these protective measures, evidence or contraband is discovered in plain view it may be admitted. The propriety of

protective measures is precisely the issue presented in *Opperman*. The officers, to protect the property of Opperman, inventoried his vehicle and while doing so discovered marijuana. The protective steps followed in the instant inventory are certainly more necessary than those in *Harris;* the officer in *Harris* was merely securing the car against rain when evidence was discovered, the officer in *Opperman* was attempting to prevent the theft of items from the vehicle and in doing so found the marijuana.

The South Dakota Supreme Court did not discharge police officers from their duty to protect property inside an impounded vehicle, but limited the seizure of items to those in plain sight:

> "We hold that 'minimal interference' with a citizen's constitutional rights means that police inventory searches must be restricted to safeguarding those articles which are within plain view of the officer's vision." *State v. Opperman*, 228 N.W.2d at 158.

If it is necessary and proper that law enforcement officials safeguard items in "plain view" it is reasonable to extend the inventory to items inside the automobile not in plain sight. Ronald W. Szwajowski in the University of Illinois Law Forum (1968) states the reason why an inventory should extend to areas not in plain view:

> "If the purpose of the inventory is to record the valuables and other personal property in the car, it would seem unrealistic to limit the search to a superficial inspection of the vehicle. In view of the fact that a person who does carry valuables in his car will most properly place them in a safe and inconspicuous place as possible, the conscientious investigator will conduct as thorough a search as circumstances permit." R. Szwajowski, University of Illinois Law Forum at 407.

Courts have recognized that the only realistic method of protecting valuables inside impounded vehicles is to allow inventories to extend into hidden or closed areas of the

automobile in lawful police custody. *United States v. Gerlatz*, 350 F. Supp. 180 (U.S.D.C., E.D. Mich. 1972); *People v. Trusty, Colo.*, 516 P.2d 423 (1973); *Capps v. State*, 505 S.W.2d 727 (1974); *State v. Gwinn*, 301 A.2d 291 (Del. Supr. 1972). Opposite to the view expressed by the Supreme Court of South Dakota, glove compartments may properly be inventoried. *United States v. Pennington*, 441 F.2d 241, cert. den., 404 U.S. 854, 30 L.Ed.2d 94, 92 S.Ct. 97 (1971); *Bennett v. State, Okla. Cr.*, 507 P.2d 1252 (Ct. Cr. App. 1973).

By limiting the scope of an inventory to items in "plain view" the South Dakota Supreme Court makes it unclear whether it is validating the seizure of items in open sight of an officer standing outside the vehicle, or whether its opinion embraces the "plain view" doctrine, that incriminating matter inadvertently discovered by officials lawfully inside one's dwelling or automobile may be seized. If it is the purpose of the *Opperman* court to assert the latter view, the evidence was rightly admitted at trial since several courts have held that items inside closed compartments of vehicles are subject to "plain view" discovery during an inventory. *People v. Trusty, supra; Capps v. State, supra.*

Whether in the opinion of the South Dakota court an inventory is limited to the securing of property in plain view from within or without the vehicle, it does make clear that it is proper procedure to protect property inside the vehicle, therefore, it seems unrealistic to place an arbitrary barrier on the scope of the police protection. The rationale of safeguarding all property inside an automobile is underscored by decisions which hold that an inventory may include the contents of containers in a vehicle. A decision enunciating this principle is a New Mexico case, *State v. Vigil*, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974). Defendant Vigil's car was taken into police custody following his arrest. During the subsequent inventory officers found a paper bag in the trunk. The bag was opened and found to contain marijuana. The Court of Appeals predicated its holding that the inventory of the bag was valid on *United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467

(1973), which provided that a "full search," not limited to items in plain view, of a person lawfully in the custody of the police is reasonable:

> "We see no reason why search should be more circumscribed where an arrestee's personal effects are involved when they, also, are in lawful custody." *State v. Vigil*, 86 N.M. at 391.

In accord that examination of tl e contents of containers inside vehicles is consistent with the purpose of the inventory are: *Roush v. State, Fla.*, 203 So.2d 632 (Ct. App. 1967); *Mackall v. State*, 7 Md. App. 246, 255 A.2d 98 (Ct. Sp. App. 1969); *State v. Montague*, 73 Wash.2d 381, 438 P.2d 571 (1968); *Knight v. State, Fla.*, 212 So.2d 900 (Ct. App. 1968); *In Re One 1965 Econoline, Etc.*, 109 Ariz. 433, 511 P.2d 168 (1973); *State v. Undorf*, 210 Kan. 1, 499 P.2d 1105 (1972).

The Fourth Amendment proscribes only those vehicular searches which are unreasonable. *Preston v. United States*, 376 U.S. 364, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964). Assuming, arguendo, that an inventory procedure is a search, we conclude, as did the *Opperman* court, with an analysis of the reasonableness of the search conducted by the Vermillion Police Department. Initially, it is important to realize that automobiles have always been accorded less protection than persons and dwellings under the Fourth Amendment. See *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). An inventory search like that conducted by the Vermillion police officer is done to protect the property rights of citizens and to protect the police against claims of property loss. *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973). An ancillary benefit is that the public safety is safeguarded. See *State v. Olsen*, 43 Wash.2d 726, 263 P.2d 824 (1953). The South Dakota court's contention that the removal of items in plain view and the closing of windows and the locking of doors satisfies the "slight duty of care" of the police may be answered by the consideration that it is certainly reasonable to believe that any competent thief will ransack likely hiding

areas of a car such as compartments and those areas not in plain view. The minimal measures advanced by the South Dakota court may satisfy the "slight duty of care" of South Dakota police but they do not reasonably protect citizens' property. It is apparent that to fully safeguard the effects left inside vehicles which are in lawful custody police officials must have the authority to conduct a detailed inventory of the vehicle.

Therefore, the Court is urged to approve the inventory procedure proscribed by the South Dakota Supreme Court and hold that the evidence discovered pursuant to the inventory was lawfully admitted.

Respectfully submitted,

TONEY ANAYA
Attorney General

WARREN O. F. HARRIS
Deputy Attorney General

Supreme Court Building
Post Office Box 2246
Santa Fe, New Mexico 87503